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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SUSAN KALOGIROU et al.,

Plaintiffs and Appellants,

v.

WAL-MART STORES, INC. et al.,

Defendants and Respondents.

E049193

(Super.Ct.No. RIC454862)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Peter L. Spinetta, Judge.  
(Retired judge of the Contra Costa Super. Ct. assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed.

Law Offices of George A. Saba and George A. Saba for Plaintiffs and Appellants.

Pettit Kohn Ingrassia & Lutz, Andrew N. Kohn and Cassandra E. Mougin for  
Defendants and Respondents.

## I. INTRODUCTION

Plaintiff Susan Kalogirou and her daughter, plaintiff Kristy Richey, were in a Wal-Mart store in Corona when Kalogirou slipped and fell, causing her to be injured. Plaintiffs alleged that Wal-Mart employees laughed at Kalogirou and called her “stupid,” and that other employees thereafter moved her against her will, causing further injury to Kalogirou. Richey saw these events, which caused her emotional distress. They sued defendants Wal-Mart Stores, Inc. (Wal-Mart) and Sarah Saenz, a Wal-Mart employee, for premises liability, negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and assault and battery. A jury found Wal-Mart liable to Kalogirou for premises liability, but rejected plaintiffs’ other claims. The jury found that Kalogirou suffered \$2,535 in damages and was 90 percent at fault.

After reducing Kalogirou’s damages based upon the jury’s comparative negligence finding, the court initially awarded her \$253.50. However, because Kalogirou did not accept defendants’ \$6,000 pretrial offer to compromise her claims, which was made pursuant to Code of Civil Procedure section 998,<sup>1</sup> the court found that defendants were the prevailing parties and entitled to recover their costs. As a result, the court entered judgment in favor of defendants and against Kalogirou in the amount of \$10,122.45 and against Richey in the amount of \$8,999.05. Plaintiffs appealed.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Plaintiffs contend the trial court made the following errors: (1) granting defendants' motion to strike punitive damages allegations; (2) granting defendants' motion in limine to preclude expert witness testimony; (3) precluding Kalogirou from testifying as to her medical treatment and payment of certain medical bills; (4) instructing the jury on contributory negligence and intoxication; (5) denying plaintiffs' motion for new trial; (6) striking Kalogirou's memorandum of costs; (7) granting defendants' motion for costs pursuant to section 998; and (8) denying plaintiffs' motion for sanctions. Plaintiffs also assert the judgment should be reversed because of misconduct by the court and defense counsel.

For the reasons set forth below, we reject these arguments and affirm the judgment.

## II. FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

### A. *Pretrial Procedural Background*

In a first amended complaint (FAC), plaintiffs alleged the following essential facts: On December 6, 2005, plaintiffs were in a Wal-Mart in Corona; Kalogirou was carrying two 1-gallon bottles of water when she slipped on a clear slippery material and fell, sustaining serious injuries and the inability to engage in her employment; Richey, Kalogirou's daughter, witnessed the fall and screamed for help; after about 10 minutes, two Wal-Mart employees arrived at the scene; Kalogirou told them she slipped and fell and asked them to call an ambulance because she could not move; the two employees laughed loudly and called Kalogirou "stupid" as they walked away; after 10 more

minutes, the store manager arrived and told Kalogirou that she was going to move her so that she could clean up the mess caused by the rupture of one of the water bottles; Kalogirou begged the manager not to touch her and asked her to call paramedics; Richey and Wal-Mart customers also told the manager not to move Kalogirou and to call an ambulance; the manager and another employee lifted Kalogirou off the ground; Kalogirou felt a very severe pain shooting down her spine, screamed with pain, and lost consciousness; the manager slapped Kalogirou several times on the face to revive her; when Kalogirou regained consciousness, she was hyperventilating with irregular breathing and heartbeat; the manager told Richey that Kalogirou appeared to be in shock and ordered an employee to call an ambulance; Kalogirou suffered physical injuries and other damages; and both plaintiffs suffered severe emotional distress.

In support of their cause of action for intentional infliction of emotional distress, plaintiffs added the allegation that by calling Kalogirou “stupid,” the Wal-Mart employees acted with malice toward her and with the intent to cause plaintiffs emotional distress. In the cause of action for assault and battery, Kalogirou alleged defendants’ conduct was intended to cause and did cause a harmful contact with her, to which she did not consent. These alleged intentional acts were malicious and oppressive.

In addition to general and special damages on all causes of action, plaintiffs sought punitive damages in connection with the claims for intentional infliction of emotional distress and assault and battery.

In January 2007, the trial court granted Wal-Mart's motion to strike the punitive damages allegations from the FAC.

In May 2008, Wal-Mart served section 998 offers to settle Kalogirou's claims for \$6,000 and Richey's claims for \$500. Plaintiffs did not accept the offers.

Defendants served a demand for exchange of expert witness information prior to trial. Plaintiffs did not respond to the demand or designate an expert witness for trial. Based on plaintiffs' failure to respond to the demand, defendants moved in limine for an order precluding plaintiffs from offering any expert testimony. The motion was granted without opposition.

#### *B. Plaintiffs' Case*

The case was tried to a jury in April 2009. According to Kalogirou, Richey, and Amanda Wieden (Kalogirou's niece), they were at the Corona Wal-Mart on December 6, 2005, to buy a Christmas tree. After picking out a tree, they went to the furniture department to look at an entertainment center. Along the way, Kalogirou stopped to pick up two 1-gallon bottles of water. The aisle in the furniture department was only wide enough for one-way traffic. A female customer was pushing a cart through the aisle ahead of Kalogirou. Richey and Wieden were at one end of the aisle and the female customer was between them and Kalogirou. The customer's cart was overloaded with merchandise; clothes hanging over the sides of the cart were hitting the shelves as she walked down the aisle. Kalogirou could not pass the woman and was walking "as close behind her as she could without crowding her."

The woman with the overloaded cart was struggling to get through the aisle and it appeared to Richey and Wieden that there was something impeding her progress. Richey later realized that the cart had been impeded by a box on the aisle floor and that the woman had driven her cart over the box by shaking the cart. Kalogirou called Richey's name, then slipped on the box, fell backwards, and hit her head on a metal shelf. The water jugs flew out of her hands and burst, causing water to go everywhere. Kalogirou landed on the floor with her buttocks on top of the box. Kalogirou testified she did not see the box before she stepped on it.

Richey and Wieden went to Kalogirou's aid. Richey noticed blood and a cut on Kalogirou's head. Kalogirou attempted to get up, but could not. Kalogirou felt pain in her head, hands, knee, lower back, ankle, shoulders, and buttocks. Richey and Wieden could tell that Kalogirou was in a lot of pain and Richey told her not to move. Richey and Wieden then went to the nearby jewelry department to ask employees for help and to call 911. Two employees followed her back to where Kalogirou had fallen. According to Richey, one of the employees said, in the presence of other customers, "you'd have to be a complete idiot to fall on the box"; the "other [employee] said, 'Yeah, you'd have to be stupid,' and they started laughing." According to Wieden, one of the employees said, "How stupid could you be to slip on a box." These remarks made Kalogirou feel humiliated, degraded, and ashamed. Saenz, a manager of the store's photo center, told the two employees to leave.

Richey repeatedly asked Saenz about an ambulance, but she did not respond or would change the subject. Wieden also told Saenz they needed an ambulance. Saenz seemed to be more concerned about the water on the floor than about Kalogirou, and ordered two employees to clean up the mess. Saenz told Kalogirou they had to move her so they could clean up the water. Kalogirou asked them not to touch or move her. Nevertheless, at least one male employee, and possibly Saenz, grabbed her and pulled her off the box, causing her to scream.

Saenz asked an employee to get a wheelchair or electric cart used by disabled people in the store. When Richey realized Saenz planned to move Kalogirou into the wheelchair, Richey and Wieden argued against it because it could hurt her. They repeatedly told Saenz not to touch or move Kalogirou and to call paramedics. Kalogirou also told Saenz not to pick her up and that she wanted to wait for the fire department. Saenz ignored or disregarded their concerns and, with the help of another employee, tried to move Kalogirou. When they started to lift her, Kalogirou screamed and passed out.

Saenz yelled Kalogirou's name and slapped her repeatedly on her face to revive her. When Kalogirou came to, she was hyperventilating and "wheezing really badly." Saenz told Richey that Kalogirou was in shock. Saenz then told an employee to call an ambulance or paramedics.

When a fire rescue unit arrived, firemen braced Kalogirou's neck and strapped her body onto a backboard. Paramedics arrived five minutes later. Kalogirou was then

transported to a hospital by ambulance. She was given morphine and released from the hospital approximately two hours later. No x-rays or MRI scans were taken.

The next day, Richey and Wieden returned to the Wal-Mart store and found the box Kalogirou slipped on. According to Richey, it was still in the aisle. Wieden said it was standing up against a shelf. It looked to Richey “like it had been there for weeks and people had walked over it a million times[.]”

Richey testified to the emotional distress she has suffered as a result of the incident.

Evidence of Kalogirou’s ambulance, paramedic, and emergency room bills were admitted into evidence. Defense objections to Kalogirou’s chiropractic bills and her testimony regarding the chiropractic bills were sustained on the ground they were unsupported by evidence that the charges were reasonably necessary and incurred as a result of the incident.

### *C. Defendants’ Case*

The defense presented the testimony of four Wal-Mart employees, including Saenz, and a paramedic. Saenz was a manager of the photo center in the store at the time of the incident. She responded to the announcement of a “code white” in the furniture department. “Code white” means there has been an accident. Saenz found Kalogirou sitting on a box in the aisle, and another employee, William Fuentes, was next to her. Richey and Wieden were also there. Saenz asked Kalogirou what happened, and Kalogirou said she had tripped on the box. Kalogirou said her lower back and buttocks

hurt. No one told Saenz that Kalogirou injured her head. She testified she did not remember anyone asking her to call an ambulance; and said that if anyone had asked her to call 911, she would have done so.

Saenz said her most important concern at that time was the safety and well-being of Kalogirou. Based on her training, her first task was to make sure the customer was comfortable and safe. She saw that water was covering the floor around Kalogirou and she wanted to get the water cleaned up to prevent another accident in case Kalogirou felt okay to stand up. Saenz cleaned up the water with paper towels. She asked Kalogirou if she felt okay to move so they could get the water around her feet. Kalogirou hesitated, then said she would move. Kalogirou scooted herself over to the far side of the aisle.

Saenz instructed Fuentes to get an electric wheelchair. She told Kalogirou that maybe she would be more comfortable getting off the floor and into the chair. When Fuentes returned with the wheelchair, Saenz asked Kalogirou if she thought she could stand. Kalogirou said she would try, and started to stand up. Saenz did not touch Kalogirou, but stood in front of her with her “arms slightly out as [Kalogirou] attempted to stand up herself just in case she was to fall forward[.]” When Kalogirou was almost standing straight up, she yelled in pain and sat back down. Saenz then instructed Fuentes to call 911, which he did.

At some point after she cleaned up the water, Saenz presented to Kalogirou a “customer statement” form regarding the incident. Kalogirou told Saenz to fill out the form for her. As reflected on the form, Kalogirou told Saenz that she was walking down

the aisle behind a woman and the next thing she knew she was on the floor; she had not seen the box on the floor. Kalogirou and Saenz both signed the form.

Saenz spent a total of approximately 20 minutes with Kalogirou. She testified that she never moved Kalogirou and does not recall ever touching her. She denied that she slapped Kalogirou, pushed her off the box, or insisted that she get off the box or into the wheelchair. She did not tell anyone that Kalogirou was in shock. She testified she never saw blood coming from any part of Kalogirou's body and that Kalogirou never lost consciousness. Saenz did not hear anyone make a comment to the effect that one would have to be stupid to slip on that box, and she did not tell anyone to leave the aisle for making such a comment.

Wal-Mart employees, Bonita Gilbert, Nina Rushing, and Fuentes, also testified for the defense. Each had responded to the code white announcement. Gilbert, who worked in the fabrics and crafts department, found Kalogirou sitting in the aisle and asked if she was hurt. Kalogirou replied that her buttocks and lower back hurt. Gilbert noticed that Kalogirou's speech was slurred and thought she smelled alcohol on her breath.

Rushing was the only employee working in the jewelry department of the store at the time of the incident. She arrived after Gilbert and saw Kalogirou sitting on the floor. Rushing did not speak to Kalogirou and was present at the scene for approximately two minutes.

Fuentes testified that he asked Kalogirou if she was okay, and Kalogirou said she was “fine,” but had pain in her wrists, legs, and back. Kalogirou did not mention her head.

Gilbert, Rushing, and Fuentes each testified that they did not see any employee touch or slap Kalogirou, did not hear anyone make any remark about a person being stupid or being an idiot to trip over a box, and never saw Kalogirou lose consciousness.

A fire rescue unit and paramedics responded to the 911 call. Ryan Rolston, a paramedic who attended to Kalogirou in the store, testified that Kalogirou was “alert and oriented” and told him that ““it felt like she twisted her knee and ankle during the fall.”” Rolston wrote in his report of the incident that Kalogirou’s “chief complaint” was “[m]id thoracic back pain [and] right knee pain.” Kalogirou told Rolston that she did not have any upper back or neck pain, loss of consciousness, or head trauma. As part of his “head-to-toe” assessment of Kalogirou, Rolston examined the back of Kalogirou’s head and found no cuts or lacerations. He noted in his report that Kalogirou suffered “trauma, minor.” “Trauma,” Rolston explained, means “any injury sustained from an outside force or impact”; “minor” refers to trauma at the lowest end of the scale of seriousness. Rolston said he would not have referred to the trauma as “minor” if he had been told of a loss of consciousness.<sup>2</sup>

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<sup>2</sup> After Rolston testified, Kalogirou testified that she was not coherent when the emergency personnel arrived and does not remember speaking with any of them or even meeting Rolston.

#### *D. Verdict and Posttrial Procedural Facts*

The jury found in favor of Kalogirou and against Wal-Mart on the first cause of action for premises liability; on all other causes of action, the jury found in favor of defendants and against Kalogirou and Richey. Based on the jury's special verdict findings that Kalogirou suffered \$2,535 in damages and was 90 percent at fault, the court determined she was entitled to recover \$253.50.

Plaintiffs filed motions to vacate the judgment and for a new trial, which the court denied.

Kalogirou and defendants submitted memoranda of costs. Each claimed to be the prevailing party and moved to strike the cost memorandum of the other. Following a hearing, the court ruled that defendants were the prevailing parties because Kalogirou failed to obtain a judgment more favorable than defendants' section 998 offers. After taking into account defendants' costs, the court entered judgment in defendants' favor and against Kalogirou in the amount of \$10,122.45 and against Richey in the amount of \$8,999.05. This appeal followed.

### III. ANALYSIS

#### *A. Striking of Punitive Damages Allegations*

Plaintiffs contend the court erred in granting Wal-Mart's motion to strike the punitive damages allegations from the FAC. Because we conclude that any error in striking the punitive damages allegations could not have affected the judgment, we reject the argument.

Punitive damages, “in addition to the actual damages,” are permitted in tort actions when there is “clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . .” (Civ. Code, § 3294, subd. (a).) Generally, mere or even gross negligence will not support an award of punitive damages. (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 368; see also *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899-900 [“ordinarily, routine negligent or even reckless disobedience of traffic laws would not justify an award of punitive damages.”].) Moreover, in order to recover punitive damages, the award must be accompanied by an express award of compensatory damages. (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147; *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677.)

In this case, plaintiffs sought punitive damages in connection with their claims for intentional infliction of emotional distress and assault and battery. They did not request punitive damages for their premises liability or negligence claims. The jury rejected plaintiffs’ intentional tort claims and found Wal-Mart liable on only the premises liability cause of action. Because plaintiffs did not, and could not, seek punitive damages on their premises liability claim, and recovered nothing on their intentional tort claims, they could not have recovered punitive damages even if the allegations had remained in the FAC.

Although Kalogirou asserts in a single sentence that she was “prejudiced . . . by depriving her of a substantial portion of her case,” she does not explain this further. She does not suggest, and the record does not indicate, that the existence of the punitive damages allegations in the FAC would have had any impact on the case other than to

permit the possibility of recovering punitive damages. In light of the jury's verdict, however, Kalogirou could not recover punitive damages even if the allegations had remained. Therefore, even if the court erred in striking plaintiffs' punitive damages claims, plaintiffs have failed to establish prejudice. (See, e.g., *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854 [Fourth Dist., Div. Two] ["Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant."].)

*B. Motion in Limine to Exclude Plaintiffs' Experts from Testifying at Trial*

Plaintiffs contend the trial court erred in granting Wal-Mart's motion in limine to exclude any expert witness testimony by plaintiffs. We reject the argument.

Prior to trial, Wal-Mart served a demand for exchange of expert witness information pursuant to section 2034.210. Plaintiffs did not respond to the demand. Nor did they include the name of any expert witnesses on the parties' joint list of witnesses.

Wal-Mart filed its motion in limine based on the plaintiffs' failure to disclose any expert witnesses, produce any expert reports or writings, or produce any experts for deposition. It does not appear from our record that plaintiffs filed any opposition to the motion.

At a hearing regarding the motion in limine, the following colloquy occurred between the court and plaintiffs' counsel:

"THE COURT: With reference to defendant's in limine number two to exclude any witness giving expert testimony in this matter, the answer to that would appear to be granted without debate.

“Is there any?

“[PLAINTIFFS’ COUNSEL]: We never had an argument about that. Plaintiff is not intending to.

“THE COURT: But this means that your client, for example, cannot—give some examples that come to mind, your client did not give us her diagnosis of what ails her. She can testify of course to what she experiences. She can testify that she feels pain here and there and wherever, but she can’t, for example, say and then I had seizures later on at which were attributable to this incident. She can’t. She can’t. That’s a medical opinion.

“In other words, she can’t testify as to medical causation in any way. She can, the cases say, as long as it’s something that doesn’t relate, doesn’t require an expert. Like I fell. I hurt my arm. I felt pain in my arm. She can testify to that. I hit my head and it hurt. That she can testify to, but she can’t—she can’t say I have a lower lumbar strain. She can’t say that. She can’t give any opinion nor can anybody else.

“And I spell that out because that’s what it means when I grant the motion here. It means that there can be no rendering of medical opinion by any witness whether it be the plaintiff or any other lay person in this matter, as well as of course no expert because we haven’t designated any expert, okay. There couldn’t even be an expert testimony by a treating physician and so far as getting a diagnosis and so forth, which in any event there isn’t any designated.

“Anybody have anything that they want to bring to my attention?

“[Plaintiff’s counsel], do you feel that’s wrong?

“[PLAINTIFFS’ COUNSEL]: No, your Honor. I mean, if we need to go into some technical terminology and things like that, I’m sure there’s going to be done through Dr. Moore, who is the defense expert witness.

“THE COURT: Well, if they call Dr. Moore—they may decide, of course, not to do so. I don’t know, but if they call Dr. Moore on this matter, you can of course cross-examine.

“[PLAINTIFFS’ COUNSEL]: But besides that I don’t have anything else to add.”

On appeal, plaintiffs contend defendants could not rely upon the demand for exchange of expert witnesses information because it was not timely served. The argument is without merit. First, the argument is waived or forfeited because it was not raised below. As our state Supreme Court explained: ““An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.’ [Citation.]” (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1, italics omitted.) As the discussion at the hearing on the motion makes clear, plaintiffs admittedly had “no argument” in opposition

to the motion and never asserted the demand was untimely. The argument has therefore been waived or forfeited.

Second, even if the argument was not forfeited, it is without merit. If a demand for exchange of expert witnesses is defective, the party asserting the defect must move for a protective order, which may include an order to quash the demand. (§ 2034.250; *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1109-1112; see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶¶ 8:1654, 8:1657, pp. 8J-8 – 8J-9.) A mere objection to an expert witness demand is ineffective. (*Zellerino v. Brown, supra*, at p. 1112.) It follows that a party served with a defective demand cannot, as plaintiffs did here, simply ignore the demand and still preserve a right based upon the defect. Therefore, even if the argument was not forfeited, there was no error in granting the motion in limine.

Moreover, plaintiffs made no indication that they would have introduced expert testimony if the court had ruled against defendants on their motion in limine. They had not listed any expert or physician on the joint witness list. Indeed, in their motion for new trial, they explain they “could not afford to pay expert fees” to their physicians and “hoped to ask [defendants’ expert witness] questions regarding causation.” Because there is nothing in the record to indicate plaintiffs would have offered expert testimony if they had been given the opportunity, they have failed to establish any prejudice resulting from the ruling.

### *C. Admissibility of Evidence of Certain Medical Expenses*

In addition to evidence of expenses for the ambulance, paramedic, and Corona Regional Hospital incurred on the night of the slip and fall, Kalogirou testified she has seen a chiropractor 71 times, for which she paid more than \$6,000. She further testified she went to Moreno Valley Hospital for treatment of fainting spells, for which she was billed \$5,302. Defendants objected to the evidence of the chiropractor and Moreno Valley Hospital expenses on the ground the evidence lacked foundation.

After the submission of briefs on the issues and argument, the court sustained the objections and instructed the jury to disregard Kalogirou's testimony with respect to charges for the chiropractor and Moreno Valley Hospital. The court explained it sustained the objections because of "the absence of any medical testimony or any admissible evidence that would allow one to conclude that those expenses were reasonably incurred as a result of the incident." Plaintiffs contend the evidentiary ruling is error.

We review the court's evidentiary ruling for an abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476.)

As an element of Kalogirou's claims, she was required to prove that her damages were caused by defendants' tortious conduct. (See, e.g., *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) Specifically, when the cost of medical services are claimed as damages, the plaintiff must show that the services were attributable to the incident giving

rise to liability, that they were necessary, and that the charges were reasonable. (*Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 81; *Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216.) Thus, evidence of medical services is relevant and admissible only if there is a sufficient foundational showing that the services were necessary and attributable to the incident. Moreover, when medical services may be attributable to more than one cause, the bill for such services may be admitted as evidence of damages only if there is evidence from which a factfinder can apportion the expense among the various causes. (*McAllister v. George* (1977) 73 Cal.App.3d 258, 264-265; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 73.)

Here, Kalogirou testified she experienced pain in various parts of her body at the time of the incident and went to a chiropractor for treatment of that pain. On cross-examination, the defense produced evidence indicating that Kalogirou had also sought the chiropractor's treatment for pain related to an accident at work six months after the Wal-Mart incident and a motor vehicle accident eight months after the incident. Kalogirou offered no evidence from a medical expert as to whether the chiropractor's services were necessary for treatment of the injuries she suffered as a result of the Wal-Mart incident. Nor was there any evidence from which the jury could apportion the expenses for the chiropractor's services to the different sources of her pain. In the absence of such evidence, the court acted within its discretion when it concluded there was an insufficient foundation to admit the evidence of the chiropractor's services and charges.

The only evidence proffered regarding the Moreno Valley Hospital expense is that Kalogirou received a bill for \$5,302 after she went to the hospital because her “fainting spells were getting worse.” This hospital visit apparently occurred in January 2008, more than two years after the Wal-Mart incident. No evidence was offered by Kalogirou or anyone else to connect her fainting spells with the slip and fall in Wal-Mart. The court correctly ruled that, until such evidence was produced, evidence of the Moreno Valley Hospital expense was irrelevant. No further evidence on the point was proffered. There was no error.

Plaintiffs’ reliance on *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 (*Greer*) is misplaced. The action in *Greer* arose out of an automobile accident. In that case, the plaintiff’s employer reached an agreement prior to trial with the plaintiff’s medical providers to “satisfy his entire medical tab” for substantially less than the amount of the medical bills. (*Id.* at p. 1154.) The defendant sought to exclude evidence of the medical bills because the sum shown on the bills exceeded the amount that was paid to settle the bills. (*Ibid.*) The motion was based on *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641 and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306, which held that a plaintiff cannot recover more for medical care than the amount that has been paid or incurred for the care, even if the bill for the care was greater. The *Greer* court held that, notwithstanding this rule, the medical bills were admissible as “evidence of the reasonable cost of medical care.” (*Greer, supra*, at p. 1157, italics omitted.) The court explained that even though the plaintiff cannot *recover*

more than the amount paid or incurred, evidence of the medical bills gives “the jury a more complete picture of the extent of a plaintiff’s injuries.” (*Ibid.*)

*Greer* is inapposite. Unlike Kalogirou, the plaintiff in *Greer* presented expert medical testimony that his injuries were attributable to an automobile accident caused by the defendant. (*Greer, supra*, 141 Cal.App.4th at p. 1153.) There was thus no issue on appeal as to whether there was a sufficient foundational showing of a relationship between the plaintiff’s medical expenses and the injury-causing incident. The issue in *Greer* was whether the medical bills were admissible as evidence of the reasonable cost of medical services. By contrast, the evidence in this case was excluded because there was no competent testimony linking the Wal-Mart incident with Kalogirou’s years of chiropractic services or the 2008 visit to the Moreno Valley Hospital. The reasonableness of the *cost* of such services reflected in the bills—the issue presented in *Greer*—was never reached because Kalogirou did not get past this foundational threshold. *Greer* has no bearing on the issue presented in this case.

#### D. *Jury Instructions on Contributory Negligence and Intoxication*

Plaintiffs contend the evidence was insufficient to support the court’s instructions as to contributory negligence and intoxication. We disagree.

A party is entitled, upon request, to correct nonargumentative instructions on every theory of the case advanced by the party that is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) “‘Substantial evidence’ is “‘such relevant evidence as a reasonable [person] might accept as adequate to support a

conclusion.” [Citation] ‘[I]f the word “substantial” means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with “any” evidence. It must be reasonable in nature, credible, and of solid value; it must actually be “substantial” proof of the essentials which the law requires in a particular case.’ [Citation.] However, the testimony of a single witness, even the party herself, may be sufficient. [Citation.]” (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.)

We review the issues de novo. (See *Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 Cal.App.4th 1086, 1094.) However, we “must review the evidence most favorable to the contention that the requested instruction is applicable [because] the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]” (*Christian v. Bolls* (1970) 7 Cal.App.3d 408, 415-416 [Fourth Dist., Div. Two].)

#### 1. Contributory Negligence

The trial court instructed the jury as to the defense of contributory negligence based on Judicial Council of California Civil Jury Instructions, CACI No. 405 as follows: “Defendants SAENZ and WAL-MART both contend that the harm claimed by plaintiff KALOGIROU to have been caused by said defendants’ negligence in moving the plaintiff after her fall was, in fact, caused in whole or in part by her own negligence. To succeed on this claim, defendants must prove all of the following: [¶] 1. That plaintiff KALOGIROU was negligent; and [¶] 2. That plaintiff’s negligence was a substantial

factor in causing her harm. If the above is proven, then plaintiff's damages are reduced by your determination of the percentage of plaintiff's responsibility. I will calculate the actual dollar amount of any such reduction."

The instruction is supported by evidence that Kalogirou was following close behind the woman with the overloaded cart (thus limiting her ability to see the floor ahead of her), that the woman in front of Kalogirou was struggling with her cart because it was impeded by some object on the floor large enough to require the shaking of the cart back and forth to maneuver over it, and that Kalogirou was looking at the shelves and calling to Richey instead of noticing the floor in front of her. Based on such evidence, a jury could reasonably conclude that Kalogirou was contributorily negligent in failing to notice the box on the floor. The court did not, therefore, err in giving the instruction.

## 2. Intoxication

Pursuant to defense counsel's request (and without objection from plaintiffs' counsel), the court gave the following instruction regarding intoxication based on CACI No. 404: "Again, [a] person is not necessarily negligent just because he or she used alcohol or drugs. However, people who drink alcohol or take drugs must act just as carefully as those who do not." The instruction was given based upon Gilbert's testimony that she smelled alcohol on Kalogirou's breath. Although no other witness suggested that Kalogirou was intoxicated and plaintiffs' witnesses testified that Kalogirou had not been drinking prior to the incident, Gilbert's testimony is sufficient to place the issue before the jury.

Moreover, if it was error to give the instruction, Kalogirou has failed to prove the instruction was prejudicial. “[T]here is no rule of automatic reversal or ‘inherent’ prejudice applicable to any category of civil instructional error, whether of commission or omission.” (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 580.) An erroneous civil instruction is prejudicial only if it is reasonably probable plaintiffs would have obtained a more favorable result in its absence. (See *id.* at p. 570.) Prejudice “is never presumed but must be affirmatively demonstrated by the appellant.” (*Brokopp v. Ford Motor Co.*, *supra*, 71 Cal.App.3d at pp. 853-854.) Here, there is nothing in the record to suggest that the jury’s verdict was based upon either Gilbert’s testimony regarding her impressions of Kalogirou or the intoxication instruction. The evidence on this point was brief and, based on our review of the entire record, relatively insignificant. Defendants’ counsel made no mention of either the instruction or the related evidence during closing argument. Nor did the jury ask any questions regarding the intoxication instruction or request a rereading of Gilbert’s testimony. Therefore, if it was error to give the instruction, plaintiffs have failed to establish prejudice.

#### E. *Judicial Misconduct*

Plaintiffs contend the trial judge committed misconduct by showing “he was biased and prejudiced against Plaintiffs throughout the trial[.]” They set forth the following list of complaints: the judge “sustained Defendants’ objections the majority of time; granted Defendants’ motions *in limine* without considering the facts and law raised in plaintiffs’ objections; refused to allow testimony by Plaintiffs’ treating physicians even

only on a limited basis; refused to admit Plaintiffs’ medical records and paid medical bills; Cross-examining Plaintiffs’ witness Amanda Wieden and other witnesses . . . in a way to suggest that the witnesses were not credible; eliciting favorable facts from Saenz while testifying . . . ; allowed the defense to examine Kalogirou on irrelevant matters; advised and/or suggested to the defense not to have Dr. Moore testify at trial . . . ; sustaining its own objections . . . ; continuously interrupting by objecting . . . ; erroneously sustaining objections based on Evidence Code section 1101 . . . ; refused to admit the majority of plaintiffs’ documents marked as Bates 1 to 39 . . . ; admitting into evidence a document without first asking Plaintiffs’ counsel . . . and cross-examining Kalogirou . . . .”

Initially, we note the argument is not properly supported by citations to the record. Briefs on appeal must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (Cal. Rules of Court, rule 8.204(a)(1)(C).) Some of the listed complaints are supported with citations to the record (indicated by our use of ellipses in the above quote), but others are not. Of the assertions that are supported by citations, some of the citations have no bearing on the fact asserted. For example, plaintiffs refer us to certain pages of the reporter’s transcript for the assertion that the court “erroneously sustain[ed] objections based on Evidence Code section 1101,” yet none of the cited pages include an objection, sustained or otherwise, or any reference to Evidence Code section 1101. Plaintiffs also cite to eight pages of testimony for the assertion that the court cross-examined Wieden and other

witnesses in a way that suggests they were not credible; yet three of the cited pages do not include any questions by the court. Finally, the citations to the record for the assertion that the court cross-examined Kalogirou are to pages in the reporter's transcript in which the paramedic Rolston is questioned by defense counsel on direct examination.

“Counsel is obligated to refer us to the portions of the record supporting his or her contentions on appeal.” (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149.) Indeed, because an appellate court has no duty to search the record for supporting evidence, we may disregard any factual contention not supported by a proper citation to the record. (*Ibid.*; *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.)

Furthermore, plaintiffs do not offer any meaningful explanation as to how the alleged acts constitute misconduct. Although plaintiffs assert in a general fashion that the court's actions show the judge “was biased and prejudiced,” and “was anything but fair and impartial,” most, if not all, of the facts asserted do not on their face constitute misconduct. It is not, for example, necessarily improper for a trial court to follow counsel's examination of a witness with its own questions, to make and sustain its own objections, or to admit or refuse to admit evidence. Although such ordinary exercises of judicial power could be misused, plaintiffs do not explain how they were abused in this case except in general, conclusionary language. Accordingly, we may reject this argument as insufficiently supported. (See *People v. Griffin* (2004) 33 Cal.4th 536, 589-590, fn. 25 [court may reject claims perfunctorily asserted without supporting argument];

*Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 482 [claim rejected because appellant “failed to provide any adequate legal analysis in its opening brief”].)

To the extent the arguments have not been waived, we reject them. Based on our review of the record and, in particular, the portions of the record that are accurately cited by plaintiffs, we find no misconduct. In light of the perfunctory and unsupported manner in which the claims are asserted, we will not specifically address each alleged act of misconduct. However, one assertion merits some discussion. Plaintiffs contend the court committed misconduct when it “advised and/or suggested to the defense not to have Dr. Moore [defendants’ designated expert] testify at trial[.]” This statement suggests that the court was advising or aiding defense counsel, which, if true, would indeed raise an issue as to the court’s impartiality. Plaintiffs base the assertion on the court’s discussion of defendants’ motion in limine to preclude plaintiffs’ use of expert witnesses, which is discussed above in part III.B. After plaintiffs’ counsel was told he would be precluded from offering expert medical opinions by either plaintiff or a treating physician, plaintiffs’ counsel said if they needed “to go into some technical terminology and things like that,” he could get that testimony “through Dr. Moore, who is the defense expert witness.” This comment indicates that plaintiffs’ counsel was assuming the defense would call Dr. Moore as an expert witness. The court responded to this with the language cited by plaintiffs for their misconduct argument: “Well, if they call Dr. Moore—they may decide, of course, not to do so. I don’t know, but if they call Dr. Moore on this

matter, you can of course cross-examine.” Far from constituting advice or a suggestion to the defense, the court’s statement appears to be an appropriate and fair response to plaintiffs’ counsel’s assumption that he would have the opportunity to introduce evidence through Dr. Moore. The court seems to be saying to plaintiffs’ counsel: you might get that opportunity, but you might not. There was no misconduct.

#### F. *Defense Counsel Misconduct*

Plaintiffs contend defendants’ counsel are “guilty of prejudicial misconduct” because they “deliberately sought to implant prejudice in the jury against plaintiffs.” We reject the argument.

Prejudicial attorney misconduct occurs ““when the conduct of counsel consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his part to awake the resentment of the jury, to excite their prejudices or passions against the opposite party, or to enlist their sympathies in favor of his client or against the cause of his adversary . . . .”” (*Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 732, quoting *Tingley v. Times Mirror* (1907) 151 Cal. 1, 23.)

“The ultimate determination of this issue rests upon this court’s ‘view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge’s control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition

under all the circumstances.’ [Citation.]” (*Simmons v. Southern Pac. Transportation Co.*, *supra*, 62 Cal.App.3d at p. 351.)

“‘Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished.’ [Citation.] “‘As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the court an opportunity to so act in the premises, if possible, as to correct the error and avoid a mistrial. Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would have removed the effect.’” [Citation.] “‘It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.’” [Citation.]” (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318; see also *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211-212.)

Because plaintiffs based their motion for new trial in part on alleged misconduct by defense counsel and the court denied that motion, one more rule is applicable. As the Supreme Court explained, when attorney misconduct is asserted in the trial court in a motion for new trial and the motion is denied, the court’s “conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong.” (*Cope v.*

*Davison* (1947) 30 Cal.2d 193, 203; see also *Nishihama v. City and County of San Francisco*, *supra*, 93 Cal.App.4th at p. 305 [same].) This is because the “trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel . . . .” (*Cope v. Davison*, *supra*, at p. 203.)

Plaintiffs set forth 12 enumerated paragraphs of alleged misconduct. Seven of these paragraphs allege misconduct during defense counsel’s opening statement or closing argument. Plaintiffs’ counsel never objected to any of defense counsel’s alleged inappropriate statements and never requested an admonition. Although plaintiffs assert that the resulting prejudice was incurable and objecting would have been futile, we find no basis in the record for coming to that conclusion. Accordingly, plaintiffs have waived any claims of misconduct based on these allegations.

In addition to allegations of misconduct during opening statement and closing argument, plaintiffs contend defense counsel committed misconduct by “[a]ttempting to introduce irrelevant matter,” specifically, a copy of a document concerning an allegation by Kalogirou’s employer that Kalogirou had taken another waiter’s tip. (At trial, the court ruled that questions about Kalogirou’s job performance as a waitress were relevant because of Kalogirou’s claim for lost wages in this action.) Plaintiffs’ counsel did not object to questions about the document, but did object to the admissibility of the document based on the parole evidence rule. Before the court ruled on the objection, defense counsel withdrew his request to admit the document into evidence. The attempt

to introduce a copy of a document concerning a relevant subject matter that might be subject to exclusion under the parole evidence rule does not constitute misconduct.

Plaintiffs next refer us to three occasions when defense counsel “interrupt[ed]” plaintiffs’ counsel’s opening statement. Each interruption consists of an objection by defense counsel. One objection was sustained, one was overruled, and one was not ruled upon. The objections were brief and appear to be only minimally interruptive. They do not amount to misconduct.

The next alleged act of misconduct involves the attempt to introduce a document purportedly prepared by Kalogirou’s ambulance service provider while questioning Rolston, the paramedic, about the document. The court sustained plaintiffs’ objection to the admission of the document into evidence and questions about its content, telling defense counsel, “You’ll have to establish it through another witness.” In short, defense counsel unsuccessfully attempted to introduce a business record and its hearsay statements through a witness who could not authenticate the document. Based on our reading of the transcript, the effort was no more improper than any ordinary, but unsuccessful, evidentiary proffer. It does not constitute misconduct.

The penultimate item of alleged misconduct is the “[h]arassing” of Kalogirou on the witness stand and misstating “the evidence of her deposition transcript regarding the touching of Kalogirou’s face.” Plaintiffs cite to a portion of the trial transcript in which defense counsel reads from Kalogirou’s deposition transcript. In the deposition excerpt, Kalogirou recalls that her daughter, Richey, was patting her face to wake her up after she

lost consciousness. Plaintiffs' counsel made no objection to the use of the deposition at trial and, on appeal, fails to explain how it constitutes harassment of Kalogirou or misstates evidence. The argument is unsupported and without merit.

Finally, plaintiffs assert defense counsel was "[c]onstantly objecting," and provides numerous citations to the record as examples. We have reviewed the record and find nothing in the objections, either separately or collectively, that amounts to misconduct.

To the extent that plaintiffs have not waived their claims of misconduct by failing to object below, we reject the arguments, individually and collectively, on the merits.

#### G. *Jury Confusion*

Kalogirou includes in the argument portion of her opening brief the heading: "The Jury was Confused." Under this heading, Kalogirou points to certain questions by the jury and speculates that the jury "must have been confused . . . ." It does not appear from her brief, however, that she is assigning any error to the perceived confusion. Nor does she refer us to any authorities that might provide a clue as to the purpose of this discussion. Because no discernible issue has been raised and no argument presented in this part, we decline to address this portion of her brief. (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [court may reject matters without discussion that are perfunctorily asserted, undeveloped, and "without a clear indication that they are intended to be discrete contentions"], disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

#### H. *Motion for New Trial*

Plaintiffs contend the court erred in denying their motion for new trial. The new trial motion was based on grounds substantially similar to the grounds asserted in this appeal. In their brief on appeal, plaintiffs set forth certain procedural facts regarding the motion, the standard of review of rulings denying motions for new trial, and the duties of the trial court when presented with such a motion to “weigh the evidence and judge the credibility of witnesses” (*Locksley v. Ungureanu* (1986) 178 Cal.App.3d 457, 463), and to “consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict” (*People v. Robarge* (1953) 41 Cal.2d 628, 633). Plaintiffs then assert this one-sentence argument: “The trial court’s failure to comply with the statutory requirements was an abuse of discretion and constituted a miscarriage of justice that requires a reversal.”

We reject the argument for several reasons. First, it is not clear with what “statutory requirements” the trial court allegedly failed to comply. Second, plaintiffs do not explain how the trial court failed to comply with any requirements (statutory or otherwise) or abused its discretion such that a miscarriage of justice occurred; in short, there is no analysis whatsoever. Third, based on our independent review of the record, we find no basis for granting the new trial motion and conclude that the trial court’s denial of the motion was well within its discretion. (See *City of Los Angeles v. Decker*

(1977) 18 Cal.3d 860, 871-872; *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)<sup>3</sup>

### I. *Memorandum of Costs*

After trial, Kalogirou filed a memorandum of costs seeking \$1,123.50. Upon defendants' motion, the court struck the memorandum on the ground that Kalogirou was not a prevailing party. Kalogirou contends she is entitled to her costs as a matter of right because she recovered \$253.50 and is therefore "the party with a net monetary recovery[.]"

Kalogirou relies upon section 1032, which provides: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).) "Prevailing party" is defined to include "the party with a net monetary recovery . . . ." (*Id.*, subd. (a)(4).)

Kalogirou does not mention section 998.<sup>4</sup> Section 998 provides that the "costs allowed under Section[s] 1031 and 1032 shall be withheld or augmented as provided in this section." (§ 998, subd. (a).) Under section 998, "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs

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<sup>3</sup> Defendants assert that the denial of a motion for new trial is not appealable. Although an order denying a motion for new trial is not itself an appealable order, the ruling is reviewable on appeal from the judgment. (§ 906; *City of Los Angeles v. Glassell* (1928) 203 Cal. 44, 46; *Ajaxo Inc. v. E\*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 46.)

<sup>4</sup> Kalogirou does discuss section 998 in connection with her argument that the court erred in granting defendants' motion for costs. (See *post*, part III.J.)

from the time of the offer.” (*Id.*, subd. (c)(1).) “In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs.” (*Id.*, subd. (c)(2).)

Here, defendants served a section 998 offer of \$6,000. Even if all of Kalogirou’s costs were incurred before the section 998 offer and are added to her \$253.50 award in determining whether she obtained a more favorable judgment, she failed to obtain more than the amount of defendants’ offer. Subdivision (e) of section 998 provides the applicable rule in this situation: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.”

The court found that defendants incurred postoffer costs in the amount of \$6,257.61. Applying the rule in subdivision (e) of section 998, this amount must be deducted from the \$253.50 in damages awarded to Kalogirou, which results in a net recovery to defendants in the amount of \$6,004.11. Because the costs awarded to defendant under section 998 “exceed[s] the amount of the damages awarded to the plaintiff,” the court correctly awarded the net amount to defendant and entered judgment accordingly.

In light of the operation of section 998 in this case, Kalogirou is not a prevailing party for purposes of section 1032. Therefore, the court did not err in striking her memorandum of costs.

*J. The Reasonableness of Defendants' Section 998 Offers*

Plaintiffs contend defendants' section 998 offers were not reasonable and not made in good faith. The argument is based upon the rule that section 998 offers not made in good faith will be considered invalid. As one court explained: "The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . . ' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.)

Generally, when the party asserting the right to costs pursuant to section 998 "shows a prima facie entitlement to costs, the burden is on an objector to prove the costs should be disallowed. [Citations.] Where . . . the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The

burden is therefore properly on plaintiff, as offeree, to prove otherwise.” (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 116-117.) As in *Santantonio*, defendants in this case obtained a judgment more favorable than their section 998 offers. The burden is therefore on plaintiffs to prove that the offers were unreasonable. Finally, “whether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court.” [Citation.]” (*Santantonio v. Westinghouse Broadcasting Co., supra*, at p. 117.)

Initially, we note that plaintiffs failed to provide us with an adequate record for review. Plaintiffs made this argument below in their motion to strike defendants’ memorandum of costs and defendants responded to it in their opposition. In the defendants’ opposition, they explained that the offers were made after a neutral arbitrator determined that plaintiffs’ claims were without merit, after their investigation had revealed that Kalogirou’s medical expenses potentially related to her slip and fall were approximately \$2,500, and after counsel’s “careful consideration of the facts of the case, the applicable law, evaluation of potential liability, and the anticipated costs to continue litigation.” The defendants cited to a declaration to support these facts, which was filed with the court. Although these facts are highly relevant to the question of the reasonableness of the offer, plaintiffs did not include the declaration among the documents they designated for the clerk’s transcript on appeal and it has not been included in the record on appeal.

The plaintiffs, as appellants, have the burden to “provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal.” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) Failure to provide an adequate record requires that the issue be resolved against them. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

Moreover, the only argument presented by Kalogirou is unpersuasive. She asserts that “it was doubtful that Defendants’ offer of \$6,000 to Kalogirou carried with it any reasonable prospect of acceptance since Kalogirou’s medical bills were approximately \$16,000.00.” She does not cite to any fact in the record to support the \$16,000 claim. Even assuming there was factual support for this amount, it is likely based in part upon the bills for her chiropractor and her hospital stay at Moreno Valley Hospital, which were inadmissible. (See *ante*, part III.C.) The argument, even if properly supported, is insufficient to satisfy her burden of proving that the offers were unreasonable or that the court’s ruling was an abuse of discretion.

*K. Denial of Plaintiffs’ Section 128.7 Motion for Sanctions*

During pretrial discovery, defendants propounded requests for admission that included the following two requests: “Admit that no Wal-Mart employee moved [Kalogirou] without her consent at the Corona Wal-Mart Store on December 6, 2005,” and “Admit that no Wal-Mart employee slapped [Kalogirou] at the Corona Wal-Mart Store on December 6, 2005.” Plaintiffs denied the requests. After trial, defendants filed

a motion for a cost-of-proof sanction; i.e., to recover \$64,770.33 in attorney fees allegedly incurred to prove the truth of these two matters. The amount of fees sought was supported by defense counsel's declaration.<sup>5</sup>

In addition to opposing defendants' motion, plaintiffs filed a motion requesting a monetary sanction against defendants' and their attorneys pursuant to section 128.7.<sup>6</sup> The plaintiffs asserted (among other arguments) that defendants' cost-of-proof sanctions motion was made "just to harass or to cause unnecessary delay or needless increase in cost of litigation." The court denied defendants' cost-of-proof sanctions motion and plaintiffs' section 128.7 motion. Our record does not indicate the court's reasons for either ruling.

Plaintiffs contend the denial of their request for sanctions was an abuse of discretion. We disagree.

Under section 128.7, an attorney who presents a motion to the court certifies, among other things, that the motion "is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." (§ 128.7, subd. (b)(1).) The certification is based upon the attorney's "knowledge, information, and belief, formed after an inquiry reasonable under the

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<sup>5</sup> The copy of the declaration provided to us appears to be truncated; it includes eight pages, the last of which ends in mid-sentence, and does not include the signature page. Neither side in the appeal has sought to correct or augment the record to include the entire declaration.

<sup>6</sup> In defendants' opposition to the section 128.7 motion, they argued that plaintiffs should be sanctioned for filing their motion for sanctions.

circumstances[.]” (*Id.*, subd. (b).) If a party violates this certification requirement, another party may move for “an appropriate sanction” against the violating attorney or the attorney’s law firm. (*Id.*, subd. (c).)

Section 128.7 “is ‘modeled, almost word for word, on rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.). In examining the provisions of section 128.7, California courts may look to federal decisions interpreting the federal rule.’ [Citations.]” (*Hart v. Avetoom* (2002) 95 Cal.App.4th 410, 413.) Accordingly, section 128.7, like its federal counterpart, should be used only in “the rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose.” (*Operating Engineers Pension Trust v. A-C Co.* (9th Cir. 1988) 859 F.2d 1336, 1344 [discussing Fed. Rules Civ. Proc., rule 11, 28 U.S.C.].)

Whether to award sanctions is a matter within the trial court’s discretion. (*Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1130.) “The court is *not* required to impose a monetary sanction or any sanction at all.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 9:1211, p. 9(III)-31.) We review the court’s decision for an abuse of discretion. (*Day v. Collingwood*, *supra*, at p. 1130; *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167.)

On appeal, plaintiffs contend defendants failed “to segregate the time and expenses in proving the particular items in dispute.” Moreover, plaintiffs argue, defendants were seeking to recover fees for services that bore little relationship to proving the matters that were the subjects of the requests for admission. (See, e.g.,

*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 736-737.) Therefore, they conclude, the “sole purpose in bringing the motion for attorney’s fees was to harass Plaintiffs, to cause unnecessary delay and to increase costs of litigation.”

We cannot conclude the court abused its discretion in denying plaintiffs’ motion. Even if defendants’ motion was flawed because it failed to adequately correlate the fees claimed with the effort to prove the matters denied, this does not necessarily mean the motion was brought for an improper purpose. Nor does it appear to us to have been frivolous, legally unreasonable or without legal foundation. Defendants propounded requests for admission, which plaintiffs denied, thereby putting defendants to the task of proving the truth of the matters denied. The cost of proof sanction under section 2033.420 is designed for just such a situation. (See *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509 [statute is “designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission”].) Thus, even if the motion was inadequately supported, it had a sound legal basis. Based on our record, we conclude the trial court acted within its discretion in concluding that defendants’ motion was not presented primarily for an improper purpose.

#### IV. DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

King, J.

We concur:

Hollenhorst, Acting P.J.  
Miller, J.